

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

Oct 2 11 22 AM '85

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3 EVELYN MARYELLEN HAYNIE and)
EDWARD KRAHEL,)
4)
Petitioners,)
5)
vs.)
6)
THE CITY OF ASHLAND, a)
7 Municipal corporation,)
8)
Respondent.)

LUBA No. 85-041

FINAL OPINION
AND ORDER

9 Appeal from the City of Ashland.

10 Jerry A. Jacobson, Ashland, filed the petition for review
11 and argued the cause on behalf of Petitioners. With him on the
brief were Jacobson, Jewett & Thierolf.

12 Ronald L. Salter, Ashland, filed the response brief and
13 argued the cause on behalf of Respondent City.

14 BAGG, Referee; KRESSEL, Chief Referee; participated in this
15 decision.

16 DISMISSED 10/02/85

17 You are entitled to judicial review of this Order.
18 Judicial review is governed by the provisions of ORS 197.850.

Opinion by Bagg.

NATURE OF THE DECISION

Petitioners ask us to reverse a determination by the City of Ashland to enforce its zoning code against petitioners.

FACTS

Petitioners' property is in a single family residential zone. Over a period of years, they have placed four railroad cars on their property. Until March, 1985, there was no official objection to this use of the property. On March 19, 1985, during the "Public Forum" portion of the city council meeting, neighbors complained about the appearance of the property. A council member was appointed as "liason" and was charged with the task of developing alternative solutions to the problem.

The city council again discussed the complaints during the "forum" portion of its agenda on April 2, 1985. Further discussion occurred during an executive session on April 16, 1985. The minutes of that meeting mention a review of "information concerning pending litigation for removal of railroad cars on the property of Ed Krahel." Record at 2.

The matter was again discussed at a public meeting of the council on April 23, 1985. The mayor reported that he had received calls from citizens asking that the council delay litigation so that a compromise could be reached. At the conclusion of the meeting, the council voted to notify Petitioner Krahel that if a compromise could not be reached

1 within 15 days, legal action was to be taken. Record at 1.

2 The record does not reflect further council action on the
3 matter. However, the parties advise us that on May 9, 1985,
4 the city attorney filed an action in circuit court seeking to
5 enjoin petitioners from maintaining the railroad cars on the
6 property.

7 ASSIGNMENT OF ERROR

8 Petitioners ask that we review the decision to enforce the
9 zoning code. Their notice of intent to appeal states, in
10 pertinent part,

11 "Petitioners, EVELYN MARYELLEN HAYNIE and EDWARD
12 KRAHEL, intend to appeal that land use decision of
13 Respondent entitled COMPLAINT TO ENFORCE MUNICIPAL
ORDINANCE and resolution in support thereof which
became final on May 7 or 8, 1985...."

14 The city argues that the complaint is not a "land use
15 decision" which LUBA is empowered to review. We agree.

16 Generally, LUBA has exclusive jurisdiction to review any
17 land use decision. ORS 197.825(1).¹ An exception, however,
18 is provided in ORS 197.825(4):

19 "(4) Notwithstanding subsection (1) of this section,
20 the circuit courts of this state retain
jurisdiction:

21 "(a) To grant declaratory, injunctive or mandatory
22 relief in proceedings arising from decisions
23 described in ORS 197.015(10)(b) or proceedings
brought to enforce the provisions of an adopted
comprehensive plan or land use regulations; and

24 "(b) To enforce orders of the board in appropriate
25 proceedings brought by the board or a party to
the board proceeding resulting in the order."
26

1 Our authority is to review land use decisions. ORS
2 197.805, 825, 835. The complaint petitioners ask us to review
3 is not a land use decision; it is instead a request to a
4 circuit court for relief, i.e., removal of petitioners'
5 railroad cars. The complaint does not itself apply the
6 comprehensive plan or zoning ordinance for the City of Ashland,
7 it asks the circuit court to perform that function as a
8 predicate to the issuance of an injunction. Compare, Medford
9 Assembly of God v. City of Medford, 297 Or 138, 681 P2d 790
10 (1984).²

11 We conclude therefore that the action petitioners have
12 appealed is not a land use decision we are empowered to review
13 under ORS 197.825. The city's action is, on the contrary,
14 specifically excluded from our jurisdiction. ORS 197.825(4) (a)
15 and (b).

16 This case is dismissed.

FOOTNOTES

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ORS 197.015(10) states:

"(10) 'Land use decision':

"(a) Includes:

"(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

(iv) A new land use regulation; or

"(B) A final decision or determination of a state agency other than the commission with respect to which the agency is required to apply goals.

"(b) Does not include a ministerial decision of a local government made under clear and objective standards contained in an acknowledged comprehensive plan or land use regulation and for which no right to a hearing is provided by the local government under ORS 215.402 to 215.438 or 227.160 to 227.185."

We are given jurisdiction to review all land use decisions, with certain exceptions, in ORS 197.825.

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In Medford Assembly of God v. City of Medford, 297 Or 138, 681 P2d 790 (1984) the Supreme Court held a determination by a city council that a church was required to obtain a conditional use before operating a church associated school was a land use decision. The court rejected the view expressed in our opinion at 6 Or LUBA 68 (1983) that the city's determination was preliminary to any final land use decision. The court reasoned that the city's determination involved the application of its zoning ordinance. The court held that the city's formal determination was a basis for our review even though the

1 determination was "only declaratory." 297 Or at 140.

2 As our opinion notes, the decision petitioners ask us to
3 review is the complaint to enforce the zoning ordinance, which
4 they say became "final" on May 7 or 8, 1985. Their petition
5 and oral argument make clear that this case is distinguishable
6 from Medford Assembly of God, supra. In the Medford case, the
7 city council issued a formal ordinance interpretation, pursuant
8 to an established procedure. Here, petitioners point to no
9 such interpretation or procedure. Indeed, the petition states,
10 "the record submitted by Respondent in this matter does not
11 even disclose whether Respondent made a decision that
12 Petitioners' property use was illegal." Petition at 7. We
13 agree. There is no reviewable land use decision. The
14 enforcement matter is for the circuit court.
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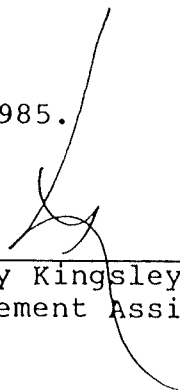
CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 85-041, on October 2, 1985, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

Jerry A. Jacobson
Jacobson, Jewett &
Thierolf, P.C.
P.O. Box 518
Ashland, OR 97520

Ronald L. Salter
Attorney at Law
94 Third Street
Ashland, OR 97520

Dated this 2nd day of October, 1985.



L. Kay Kingsley
Management Assistant